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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

On Certiorari to the Supreme Court of the State of Florida.

REPLY BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Statutes involved are cited at page v of the Index to Petitioner's Main Brief and are set forth in full in Appendix B thereto at page 54.

MISCELLANEOUS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 402.

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

On Certiorari to the Supreme Court of the State of Florida.

REPLY BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The brief of the respondent is on its surface a plausible document. Its plausibility, however, is attained by the use of the following devices: (1) serious inaccuracies in the statement of facts; (2) argument of questions not before the Court; and (3) confusion of the simple issues involved. To bring into sharp relief these characteristics of respondent's argument it is necessary briefly to restate petitioner's position.

The Petitioner's Position.

Petitioner was deprived of its federal right established by the Robinson-Patman Act by the action of the Florida court when it entered judgment without subjecting to trial the issues of fact raised by petitioner's pleadings. These pleadings alleged that the transactions which were the consideration for the notes sued on were unlawful under the Robinson-Patman Act.

To sustain this proposition petitioner has shown in its original brief: (1) that the defense of illegality available at common law and under the Sherman Act is likewise available under the Clayton and Robinson-Patman Acts; and (2) that the Florida court denied petitioner a trial on the issues of fact raised by its defense of illegality.

Petitioner, therefore, contends that the case must be remanded for a trial on these issues.

If, however, the Court should decide that the incomplete hearing of evidence below constituted a procedure which accorded an adequate protection of petitioner's federal right to a trial on the issues raised, two alternative propositions involving substantial federal questions become relevant. They may briefly be stated as follows:

(1) If the incomplete hearing below is to be considered a trial on the issues of fact raised by the pleas, respondent has not met the burden of justifying its price system which the Robinson-Patman Act imposes upon it. For it has refused not only to submit its witnesses to cross-examination but also to disclose its books of account which were the only direct evidence of the actual operation of its price system;

(2) The evidence introduced by the respondent affirmatively shows that it violated the Robinson-Patman Act by subjecting its smaller customers to a discriminatory price system which substantially lessened competition. The record demonstrates the truth of this proposition with respect to the underlying price system set up by respondent which affected each and every transaction between the parties

here. This scheme of unlawfully permitting respondent's large purchasers of cans to pool purchases made in their various plants throughout the country enables said large purchasers to secure the discounts up to 5%, and this scheme directly and inherently affected every transaction by petitioner out of which emerged the notes on which suit has been brought. The above statement is necessarily true in that petitioner, by reason of being only a small canner, did not have the purchasing power which its large competitors have as a result of the pooling of purchases made by them in their numerous plants. All other discrimination and inequality of treatment charged by petitioner are in addition to this all-pervasive scheme the effect of which has been to narrow the margin between petitioner's higher cost for cans and the uniform price at which it had to meet the competition of its larger rivals in the open market.

The Respondent's Statement of Facts.

In its statement of facts respondent attempts to obscure these simple issues by assertions, some of which are merely misleading, some of which are less than the whole truth, and some of which actually contradict the record. The general purpose is to give the impression that there was in the court below a trial of the issue of illegality adequate to protect petitioner's federal right. The statement attempts further to give the impression that the legality of the respondent's price system was established by the evidence at this "trial". A subsidiary purpose is to create the impression that if there was any illegality only a small and unidentified portion of the transactions were tainted with it. We will, therefore, list numerically typical examples of the inaccurate or misleading assertions in respondent's statement of facts:

(1) *Quotation from Respondent's Brief, page 2:* "In part the renewal notes represented unpaid interest on the old notes. (R. 361-62.)"

Comment: The record shows that interest on the old notes was separately paid. The above statement has no support in fact. (R. 362, 421.)

(2) *Quotation from Respondent's Brief, page 2:* "None of the original notes . . . had been tied to a particular transaction."

Comment: This is misleading. The record shows that all of the notes are tied to the entire series of transactions. We contend that all of these transactions involved in this litigation are marked by violation of the Robinson-Patman Act.

(3) *Quotation from Respondent's Brief, page 2:* "The principal defense offered was the allegation that in some of the sales originally made . . . the respondent had unlawfully discriminated against the petitioner in violation of the Robinson-Patman Act."

Comment: The record shows that our principal allegation is that *all*—and not *some*—of the sales constituted violation of the Robinson-Patman Act. (R. 41-46.)

(4) *Quotation from Respondent's Brief, page 3:* "The record discloses the following: Bruce's Juices, Inc., the petitioner, is a processor of fruit juices operating canneries located at Tampa, Florida; Bridgeville, Delaware; Geneseo, New York; and Santa Rosa, Texas. It also has products canned for it at Vincennes, Indiana. (R. 378.)"

Comment: The record shows that Bruce's Juices, Inc., has intermittently carried on small operations at one or more of these points. (R. 483, 484, 488.) The intent here apparently is to give Bruce's Juices, Inc., the appearance of doing a nationwide business.

(5) *Quotation from Respondent's Brief, page 3:* "From 1928 to 1942. . . . The remainder of its [Bruce's Juices, Inc.] needs was purchased from The Continental Can Company. (R. 372.)"

Comment: The record shows that in all this time only one purchase was made from Continental and that was with the permission of American Can Company. (R. 378.)

The apparent purpose of this statement is to give the impression that respondent was furnishing only a part of petitioner's needs.

(6) *Quotation from Respondent's Brief, page 4:* "Petitioner was a difficult account to sell and service."

Comment: Nugent, for the American Can Company, testified that Bruce's Juices, Inc., was "one of our good accounts." (R. 192.)

(7) *Quotation from Respondent's Brief, page 4:* "The uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent. (R. 353, 513, 536.)"

Comment: There is no evidence in the record of the cost of selling or servicing petitioner. The "uncontradicted" evidence referred to consists of derogatory statements of two adverse witnesses without factual support. We quote the strongest record reference against us on this point as indicative of what the respondent thinks is "uncontradicted" evidence.

> "Q. (By Mr. Allison) Mr. Slayton, you stated . . . that Mr. Bruce complained of the 3-12 cans sales in Texas. Is that the only complaint that he made?
> A. No sir, he made numerous complaints.
> Q. You mean over the period of years he complained?
> A. Yes sir, that is right.
> Q. About any particular thing or just everything?
> A. I think, my personal opinion is that he was a damned hard customer to serve and always complained." (R. 353.)

(8) *Quotation from Respondent's Brief, page 4:* "In addition, petitioner was a doubtful credit risk. In 1937 the respondent agreed to extend $125,000 in credit to the petitioner by accepting a series of interest bearing notes up to that amount."

Comment: The first sentence in the above quotation gets no support in the record. It is negatived by Bruce's testimony. (R. 88 and 89.) More significantly we find Nugent,

Sales Manager of American Can Company, testifying (R. 192) "... we considered the Bruce's Juices as being one of our good accounts, ..."

The second sentence in the above quotation distorts the record which shows that the line of credit was volunteered by American Can Company without a request. Bruce testified (R. 89):

> "... I never asked them for a line of credit, but they offered to extend me a line of credit, and I said, what is your idea, what do you propose, because I had my arrangements practically made with the Continental Can Company, and they said, we will figure it out and let you know, and they met me on a Sunday afternoon at my hotel and *they told me they would extend me a $125,000 line of credit*, and *I told them that was more than I needed*'" (Italics supplied).

(9) *Quotation from Respondent's Brief, page 5:* "As already noted, petitioner did not and could not establish what portion of the indebtedness represented by the renewal notes arose after the enactment of the Robinson-Patman Act."

Comment: This is a misstatement. Actually all indebtedness arose after the Act had gone into effect. (R. 169, 254, 255, 292, 362, 579, 580).

(10) *Quotation from Respondent's Brief, page 5:* "... the alleged discrimination against petitioner in the sale of small serving cans is not charged to have occurred before September 1939 (R. 182), ..."

Comment: The record citation does not support this statement. It is true only as to secret price discrimination. The quantity discount, freight allowance and other discriminations were applicable to small cans prior to that date.

(11) *Quotation from Respondent's Brief, page 5:* "The alleged discrimination through use of quantity discounts during the period when the indebtedness arose was confined to companies described as competing with the petitioner in the *grocery* size can fruit juice field. (R. 506.)"

Comment: The record reference does not support this statement. The Morgan Packing Company and the Hawaiian Pineapple Company were also competing in the small can field. Hence, discrimination was charged in both fields. But in addition to this, the scheme of classifications of customers and the overall discounts applied to both small and large cans. (R. 129, 130, 171 and 373.)

(12) *Quotation from Respondent's Brief, page 5:* "Petitioner could not and did not offer any evidence to establish what portion of the total amount of the four notes represented a prior indebtedness arising out of the purchase of the grocery size cans."

Comment: This statement is immaterial if true, because the scheme of discount by aggregate dollar volume of annual sales comprehends all cans bought whatever their size or price.

(13) *Quotation from Respondent's Brief, page 6:* ". . . respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was abandoned below."

Comment: There is no record citation for this statement. It is disputed by Bruce's testimony (R. 73) and there is no evidence to contradict him.

(14) *Quotation from Respondent's Brief, page 7:* "Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated."

Comment: There is no requirement in Florida practice that the defendant establish a *prima facie* case by producing evidence at a pre-trial conference. The sole purpose of the conference as stated by the Judge, was to simplify the issues. (R. 58.) [1]

[1] The authority for such procedure is a rule of the Supreme Court of Florida adopted by the Circuit Court for Hillsborough County which directs that a pre-trial conference may be had to consider:

(15) *Quotation from Respondent's Brief, page 7:* ". . . certain questions asked witnesses were temporarily not answered and were certified to the trial court for ruling . . . There was ample opportunity to secure these rulings: but no attempt was made by petitioner to secure such rulings."[2]

"(1) The simplification of the issues;

"(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." 141 Fla. 327, 328-329

The pre-trial conference was not and was never intended to pass upon questions in issue and there is no basis in Florida law therefor.

[2] Testimony was taken before the court in Florida, on some three occasions in New York, and again before the Florida court in October, 1943.

The record shows particularly in reference to the testimony of Mr. Nugent, General Manager (R. 103-220), some 55 questions which counsel for the American Can Company instructed the witnesses not to answer and which were certified to the trial court.

American Can Company likewise introduced in evidence some exhibits (1-14) in an endeavor to justify quantity discounts given by it as a matter of practice to its large purchasers. At the same time it declined to permit investigation of the original records from which these exhibits were compiled.

Objections were made to these exhibits, which objections were never ruled upon and the exhibits were never admitted in evidence. (R. 455-458.)

Comment: This statement is contrary to fact. The petitioner pressed for rulings until the judgment of the lower court made all the evidence irrelevant. (R. 578-579.)

(16) *Quotation from Respondent's Brief, pages 7 and 8:* "The questions asked [by petitioner] were exceedingly broad and there was good reason to believe that they were designed to harass respondent and to compel disclosure of a large amount of confidential information pertaining to the private business of numerous other customers of respondent who were competitors of petitioner."

Comment: This statement is untrue. The record reveals no desire to harass respondent or to obtain any information other than that necessary to establish the actual operation of the discount system.

(17) *Quotation from Respondent's Brief, page 8:* "Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent. (R. 578.)"

Comment: What actually happened was that counsel was forced to close his case because the court ruled that all of the testimony which was being taken in respect to the price-system of American Can Company related to a plea which it held to be unavailable. The colloquy between court and counsel is at pages 578-579 in the record.

(18) *Quotation from Respondent's Brief, page 9:* "One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not 'legally available as a defense in the state courts in a common law suit on the promissory notes involved.' "

Comment: The attempt is, by adding the concurring judge, to make it appear that the Florida Supreme Court ruled that all questions of fact raised by the federal plea had been disposed of below. The opinion of the concurring judge reveals the misconception created by the omission of the clause beginning with "therefore". It reads as follows (R. 621):

"Upon reconsideration of the matter I have come to the conclusion that the subject matter of the pleas is not legally available as a defense in the state courts in a common law suit on the promissory notes involved. I therefore concur in the conclusion that the judgment of the Court below should be affirmed."

Further comment on the reliability of the statement of facts in the respondent's brief is unnecessary in view of the inaccurate and misleading statements pointed out above.

The Texture of Respondent's Argument.

It is usual, in a reply brief, to comment on shortcomings as the argument unfolds. Here, however, the devices employed to answer, to confuse, and to avoid the issues which the case presents are so omnipresent that a detailed refutation would unduly enlarge this document. A brief comment upon the craftsmanship of the respondent, device by device, would seem to be in order.

1. An habitual resort is to question-begging, or to assuming what needs to be proved. A very few examples must serve for the extended catalogue which might be written. Thus it is stated (Res. brief, p. 12), "Petitioner's position . . . creates for it a defense . . . based on transactions which in and of themselves were strictly legal." The "in and of themselves" will be discussed below. The question at issue is, of course, the legality of the transactions in question. Again, respondent (Res. brief, p. 41) stated, "The trial court allowed all relevant evidence to be introduced." The context is concerned with the failure of the trial court to pass upon "the certified questions which various witnesses had declined to answer." Thus the relevant evidence, as respondent would have it, is that which the trial judge, after eliminating the federal question, permitted to be introduced. And again (Res. brief, p. 32), "The affirmance by the Florida Supreme Court of the judgment entered by the trial court obviously involved approval of the procedure by which the judgment had

been obtained." Thus the question at issue whether a federal right has been abrogated by that procedure is ignored.

2. A device also given full employment is letting the part do duty for the whole truth. Thus the criminal provisions of the price-discrimination section of the Robinson-Patman Act are set down (Res. brief, p. 16), but the civil provisions are not recited. And thus, it is stated that price-differences are not themselves made illegal (Res. brief, p. 9) but respondent carefully sidesteps the fundamental proposition that a presumption of illegality is set against them which it is incumbent upon them to rebut. Thus, too, $102,000 of the indebtedness is claimed to be "entirely free and clear of any taint of illegality." This is done by omitting a discussion of the dominant issue, i.e., whether the series of transactions out of which the indebtedness arose came under the operation of an illegal system of so-called quantity discount.

3. In like manner the issues are obscured by a recurring drift of the argument into irrelevant issues. Thus (Res. brief, p. 34) much is made of dates of particular sales although the record repeatedly discloses that all the transactions occurred after the Robinson-Patman Act went into effect. In general the attempt is to divert attention to questions of detail many of them irrelevant to the main issue. Thus many paragraphs are given to the relation of specific notes to concrete sales (Res. brief, pp. 36-37) and to the fairness of the prices for small cans (Res. brief, p. 35), but respondent ignored the fact that whether its system of trade practices is lawful or not is here of controlling importance. In determining this issue, it is to be noted that the record undeniably establishes that whatever were the prices quoted by the respondent for its small cans, Bruce's Juices, Inc., was denied the discount which was permitted to its larger competitors by reason of the pooling arrangement by which said large competitors were permitted to aggregate the volume of their purchases in their various plants throughout the United States. Whether

intentional or not, respondent's procedure leads to a confusion of the question which the case presents by the creation of verbal dust-storms. The following sentence—in which the fairness of the quoted price on an item takes the place of the validity of the system of discounts—must stand as representative of many to be found in the brief. "Moreover, if the giving of a higher price to one customer renders all sales to all other customers at higher prices wholly illegal, the penalty for violation would thus run many hundred-fold the amount of the discrimination." (Res. brief, p. 30.)

4. It would be tedious to protract a recitation of all these issue-evading devices. Their range is as wide as the techniques of argument. There is, however, to be noted confusion in the use of concepts. Thus "price difference" and "price discrimination" are used interchangeably. (Res. brief, p. 19.) The "summary judgment" of the circuit court for Hillsborough County is meant to mean the judgment actually rendered after the case had been stripped of the federal question and also to mean a definitive declaration of the legality of American Can Company's price structure. It is argued at one place that for American Can Company to reveal its accounts with other customers would invite a disclosure of business secrets (Res. brief, p. 41) and at another place that an inquiry into cost differences—essential to any justification of price differences—would involve a comprehensive study of the accounts of competitors which could not be safely entrusted to a state court. (Res. brief, pp. 29-30.) And repeatedly it is assumed that questions were passed upon which were left open. The irrelevant and mischievous at one stage of the argument becomes relevant at another.

Of such stuff is the texture of respondent's argument. This slight account of its techniques is necessary, because it is within such a rhetorical matrix that the substantive arguments of respondent are set.

The Substance of Respondent's Argument.

Instead of directly meeting the issues of the case, the respondent has chosen to organize its argument around certain focal points. In general its discussions drive away from the questions before this court; in general they constitute exercises in dialectic far removed from the actualities of the market amid which processors of fruit juices must compete for trade. The sum of these oblique arguments falls short of an answer to the questions raised by the instant case. The more important of these require no more than brief notice.

1. *Specific Transactions.*—The general strategy of the respondent is to substitute a series of minor issues for the large and simple question which the case presents. To that end it is insisted that specific debts must be associated with particular transactions. In this way two advantages are sought. The first is to raise the question of what sales were made before and what sales were made after the Robinson-Patman Act went into effect. The second is to associate the debt with the sales of particular lots of cans which it is contended were used as containers for a non-competitive product. The first question will not stand up, for all the debt was incurred during the period the Robinson-Patman Act has been in effect. (R. 169, 254-255, 292, 362, 579-580). The second is an attempt to play up the small can, a matter more fully discussed under the caption below. The effect is to escape a discussion of the validity of the system of discounts set forth in the standard contracts.[3]

Throughout petitioner sets forth several and distinct forms of price discrimination, which tersely stated are:

[3] The standard contract, used with all customers of American Can Company provides that if there is one or more contracts, "the Buyer shall be entitled to one single discount upon the aggregate purchase of Sanitary Cans by Buyer under this contract and such separate contract or contracts combined."

(1) furnishing of closing equipment; (2) allowance of freight; (3) furnishing transportation; (4) selling at lower prices by means of illegal discounts; and (5) secret prices on little cans, all such discriminations being made in favor of petitioner's competitors and against petitioner. Two of these discriminations have been emphasized more than the others—(a) the illegal scheme of quantity discounts whereby the large competitors of petitioner were permitted to pool their purchases made through their various plants scattered throughout the United States and its possessions in arriving at the gross purchases upon which respondent bases its price discounts up to 5%; (b) the secret price given on the little can on sales made in Texas. The device employed by respondent is obvious, i.e., by particularization to confuse and obscure respondent's unlawful discrimination in allowance of quantity discounts.

2. *The Small-size Cans.*—The treatment of small-size cans reflects a technique prompted by the same strategy. Respondent claims that the major part of the indebtedness was incurred by petitioner in purchases of cans processed to individual requirement. It insists that, not only did these involve unusual expense, but that it sold no cans of the same size to other processors of fruit juices. Hence, since in respect to these transactions Bruce's Juices, Inc., had no competitor, there could be no discrimination. The record shows that Morgan Packing Company sold fruit juice in small cans. (R. 543.) At best the question of whether respondent did sell to others cans used to market processed fruit juices in competition with Bruce's product is a disputed matter. Brands of a particular commodity do not have to be in containers of exactly the same size to compete. And the Robinson-Patman Act specifies that the goods sold must be of a "like grade"; it does not say of an exact size. Putting then the respondent's contention in its most favorable light, it presents a question which

should be submitted to trial at law.[4] But, again, it completely ignores the larger issue of the legality of the systematic scheme of discounts running up to 5% to which the aggregate dollar value of annual sales to large customers was subject. Cans are a miscellaneous category of various sorts and sizes contrived to serve the same or different purposes. There are cans for corn, peas, asparagus, string-beans, tomatoes, pineapples, peaches and a great array of products, sold in diverse markets. (R. 213-14.) The one thing in common is that this discount, operating in disregard to type and size of product, applied to all sales of cans whether of grocery or smaller size, and regardless of what purpose for which used.

3. *The Collateral Issue.*—A variant of the same strategy is respondent's play upon the word "collateral". The attempt is made to distinguish from the instant case "the refusal" of the courts "to enforce a contract restraining trade" under the Sherman Act. (Res. brief, p. 20.) It seems to be argued that, under the Sherman Act, a contract must in itself, without reference to any other instrument reveal on its face restraint of trade to be pleadable as a defense. It is then argued that under the Robinson-Patman Act, no charge of illegality of a price system can be given where the buyer is a victim of the seller's offense. From this respondent argues that the notes resulting from the trade practices exemplified by the contract are legal. Respondent then takes the position that petitioner may not examine sales to petitioner's competitors irrespective of discounts given them because respondent claims such sales to be collateral.

For the respondent to call the restraint of trade involved here "collateral" does not make it so. Nowhere

[4] The attempt to associate specific notes with particular transactions is a call for an answer to an irrelevant question. Mr. Allison, counsel for American Can Company, in the pretrial conference stated, "The question is, was the transaction unlawful, that is the question raised by the pleas." (R. 454.)

in the list of cases cited in support[5] has the word "collateral" the meaning which respondent attempts to give it. Of course, as Mr. Justice Brandeis, quoting Mr. Justice Holmes, put it "'a person does not become an outlaw and lose all rights by doing an illegal act.'"[6] Or, in a word, if a man restrains trade, the law does not forbid him to collect his debts not touched by the restraint.

But respondent gives the word collateral a meaning quite alien to its use in the cases cited. The standard contract itself, with its classification of customers and its recitation of the schedule of discounts is—and has by the General Counsel of American Can Company been admitted to be—a *prima facie* violation of the Robinson-Patman Act—and without reference to any other document. (Pet. brief, p. 32.) The discrimination which the law condemns rests upon price differences. Therefore if discrimination by a seller against a single customer is to be shown, there must of necessity be examination into the terms of sale to other customers. For that reason the law itself compels the inquiry to go beyond the transactions between seller and complaining customer. The transactions called "collateral" by respondent—unlike those in the cases cited—are themselves an integral part of the system of price discrimination. Surely a matter cannot at one an the same time be an essential of price discrimination and yet collateral to it.

4. *The Congressional Intent.*—In this same attempt to deny under the Robinson-Patman Act a defense available under the Sherman Act, respondent's brief invokes legislative history. In support of its contention that "a de-

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[5] See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Small Co.* v. *Lamborn Co.*, 267 U. S. 248; *Loughran* v. *Loughran*, 292 U. S. 216; *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U. S. 165; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590; *Farmers & Mechanics Nat. Bank* v. *Dearing*, 91 U. S. 29.

[6] *Loughran* v. *Loughran*, 292 U. S. 216, 228, quoting *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425. Cited in Res. brief, p. 23.

fense of voidness, based on collateral Robinson-Patman Act violations" is not allowable, respondent deduces the intent of Congress from its own conception of practical business considerations. (Res. brief, p. 28.) It also insists (Res. brief, p. 25), that the legislative debates afford "no foundation for the defense interposed." Its dominant point is that the Congress did not create—it did not even consider creating—such a plea in defense as that of which petitioner has sought to avail itself. It admits the validity of such a plea under the Sherman Act, but fails to note that under it Congress did not create—or even consider creating—such a defense. The reason for the silence of Congress at the time the Robinson-Patman Act was passed—as at the time the Sherman Act was passed—is obvious. The Congress did not have to create a defense which as a matter of right was already available to the litigant. As price-discrimination is in itself and by Act of Congress a restraint of trade, the right available at common law and under the Sherman Act is accessible under the Robinson-Patman Act.[7]

5. *Burden of Proof.*—The attempted justification by respondent of its so-called quantity discounts not being based upon actual savings but rather on illegal classification of customers according to size fails to present even an issue of fact. Respondent admits that it has not and does not in this case show actual savings between sales to petitioner and its large competitors but arbitrarily classifies them according to size. Therefore, no facts could be introduced by respondent to justify such a system. However, irrespective of the above, respondent has admitted that the burden of proof rests upon it to justify the differences in price as being free of discrimination. (R. 367.)[8] Respond-

[7] See Petitioner's Brief, pp. 20-26.

[8] Mr. John M. Allison, Attorney for the plaintiff, stipulated in the course of the pre-trial conference as follows:

". . . Plaintiff concedes and offers to stipulate on the record that the Defendant, for the purposes of the pre-trial conference, has the right to rebut by competent material

ent says much about the impracticality of assessing costs against individual buyers and in favor of theoretical costs by classes of customers. Petitioner insists that the individual should not be penalized for the inefficiency of backward firms and the countryside canner as in the Ozarks (R. 508-509), which raise average costs. The question of individual as against group cost is at issue in this practice of the American Can Company. It is petitioner's contention that the Robinson-Patman Act, Section 13(a), that permits differences in price "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" refers to sales to particular customers and not to classes of customers. To permit classifying customers upon the basis of amount of total purchases made—size of customers, would be, as in this case, to permit the large corporations to be the favored few and the small purchaser, irrespective of how efficient his operation and irrespective of the fact that actual sales and delivery could be made to him cheaper than to a plant of a large competitor, nevertheless to be penalized. A kindred issue is the allocation of overhead among the several classes of customers. Here the most tangible standard upon which respondent falls back is "the practice" of the American Can Company. (R. 243). It is submitted that the practice of respondent's company cannot at one and the same time be the issue in this case and the standard by which that issue is to be resolved.

Respondent insists that its scheme of cost accountancy, intended to confer the blessing of the law upon its trade

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and relevant testimony, if any it has, the evidence heretofore adduced by the Plaintiff, as *prima facie* justification for quality [quantity] discounts, which Plaintiff admits it allows to its purchasers of Packers cans, under the terms, conditions and provisions set forth in its contracts, . . ."

practices, is of a kind with a cost study which compared the costs of selling Sears, Roebuck and Company with the *average* of the cost of selling to the independent tire dealers.[9] An analysis of that intricate case cannot be attempted here. It is enough to say that it came up under the Clayton, not under the Robinson-Patman, Act; that the two parties to the case had each its own system of cost accountancy, and that the perplexities of that matter exhibited defects in respect to the burden of proof which it was the very purpose of the Robinson-Patman Act to correct. There costs alleged in justification were subjected to critical scrutiny; here hypothetics have had to do duty for the original records which were available, but which the respondent failed to produce. (R. 231-233.)[10] It is enough that the court refused to consider the evidence, to rule on objections to exhibits, to take up questions certified. (R. 455-458.)[11]

6. *Credit and Consequences.*—Respondent argues at some length the dire consequences which would attend a decision

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[9] *Matter of Goodyear Tire and Rubber Co.*, 22 F. T. C. 232; *Goodyear Tire and Rubber Co.* v. *F. T. C.*, 92 F. (2d) 677, 304 U. S. 257; 101 F. (2d) 620; cert. den. 308 U. S. 557.

[10] It is not without significance that when the American Can Company wired "the eight competitors" of Bruce's Juices, Inc., the small companies replied that they were willing to have the records of their dealings with respondent put in evidence and the large companies that they were not. (R. 216-218).

[11] The judge's attitude, with its overtones of fear against getting into deep water, bears eloquent witness to the failure of the pre-trial conference to reach legal conclusions upon "the facts submitted in evidence." The trial judge remarked, "This question is not one that ought to be before this court as I have had occasion to remark but it ought to have been before the Federal Trade Commission on the question of whether or not this system that is set up here is legal under the Robinson-Patman Act. It hasn't got any business in this Court because we have not the facilities to investigate all those things . . ." (R. 578).

in petitioner's favor.[12] The chief argument is that an allowance of the defense sought would impair the capacity of the small processor to obtain credit and would lead to the depreciation of the resulting commercial paper. (Res. brief, pp. 28 ff.) The answer is, of course, that any problem of the inability of the small manufacturer to secure ready access to necessary credit should be attacked at its source. If credit is not available, or commercial paper is subject to discount, the reason is the legal jeopardy in which the transactions out of which they emerge stand. That jeopardy is most easily removed by the seller obeying the law and accommodating his price system to the standards of the Robinson-Patman Act. If discrimination is removed, with it will go the competitive disadvantage attending the power of such concerns as American Can Company to impose upon small business the squeeze play which narrows the margin between price and costs. Once such a discrimination is ended, the little fellow becomes a better credit risk.

A like critical attack is invited by a number of other aspects of the argument.

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[12] A footnote is thrown up against petitioner's argument on the concentration of wealth. (Res. brief, footnote 20, p. 39.) The matter presented is subject to challenge for two reasons: first, it does not go back of the facts of nominal ownership, and, second, it indulges a *post hoc, propter hoc*. But, waiving these objections, the figures recited run counter to respondent's contention. For in the period covered, from 1936 to 1939, the number of canners increased 15%; the number of canners of grapefruit juice increased 36%; and the "pack" of grapefruit juice increased 205%. Figures are given for canners of orange juice, but not for the size of the pack. So that comparison cannot be made. Thus, so far as the matter is disclosed, there is a strong trend towards concentration.

CONCLUSION.

We believe that the most convincing conclusion of this reply brief can be made by summarizing respondent's argument.

Respondent's argument is divided into two parts. The first contends that a violation of the Robinson-Patman Act by the seller does not remove the obligation to pay for the goods received by petitioner. The second part argues in the alternative that the incomplete pre-trial conference offered a sufficient basis for a summary judgment on the issues of fact raised by petitioner's defense of illegality.

The logic of the first part of the argument is difficult to spell out. It seems to run as follows: The Act does not outlaw price differences. (Respondent ignores the fact that the Act makes them *prima facie* illegal.) Illegality of a price contract with one individual therefore cannot be determined without examining contracts with others. This, argues respondent, cannot be done because the contracts with others are "collateral" and the terms thereof inadmissible to prove illegality. No single transaction which is part of an illegal price scheme is illegal in itself. It is only the relationship between the sales that is unlawful. The result, they contend, is that a seller may engage in a course of selling which is illegal as a whole and at the same time enforce as a valid obligation each separate transaction used to carry out the illegal purpose. Respondent concludes that it is, therefore, the duty of the state court to split the illegal price scheme into separate transactions each of which standing alone is legal and thus to enforce piece-meal its unlawful purpose.[13]

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[13] In a word the argument is that the pulverization of an illegal course of conduct into its several parts is a penetential procedure which confers immunity to the law. In the instant case this idea appears for the first time on appeal to this Court. At the pre-trial conference respondent's counsel admitted over and over again that the statute put on it the burden of proof in this particular case to justify the price differences between petitioner and its competitors. (R. 367.)

Respondent adds a refinement to this argument apparently for the purpose of driving a sharp line between the Sherman and the Robinson-Patman Acts and for the purpose of distinguishing cases which run against respondent's contention.[14] According to opposing counsel this refinement consists of the assertion that if the buyer and seller were in *pari delicto*,—if they were both engaged in a conspiracy to victimize a third party in violation of the Act—in such a case the buyer would have a defense of illegality.[15] They make the amazing assertion that the defense of an illegal price discrimination is not available to the victim. His innocence takes away his federal right by making it impossible to prove illegality without going into collateral transactions. Such a result is on its face, pure nonsense. It is repudiated in principle by the case of *Continental Wall Paper Company* v. *Louis Voight & Sons Company*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and is categorically repudiated in the first opinion of the Florida Supreme Court in this case.[16]

Respondent suggests but two reasons why Congress would have intended consequences which are so contradic-

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[14] Respondent seems to have missed the point in Walton Hamilton, "Cost as a Standard for Price," 4 Law & Contemp. Problems 323. The author's contention is that cost accountancy is too uncertain and its techniques too receptive to arbitrary judgment to serve as a standard upon which a judgment between the lawful and the unlawful can be safely rested. Overlooking this, the respondent cites the article in support of the proposition that "a sound policy . . . cannot be achieved by the widely dispersed federal and state courts." (Res. brief, p. 27).

[15] In a word a defense is not allowable under the Robinson-Patman Act, which as a conspiracy of buyer and seller against another buyer, is not allowable under the Sherman Act. The range of restraint, as outlawed by the Sherman Act, is not so narrowly limited as is contended here. Nor is petitioner willing to admit that the discrimination which it pleads is not a violation of the Sherman Act. The would-be rule of law seems to be a creation by respondent for the very purpose of insuring its own legal immunity.

[16] (R. 599).

tory to the purpose of the Robinson-Patman Act. The first is that to allow the victim of an unlawful price scheme a defense would impair our national credit structure. The second is that it would force unspecialized state courts to decide whether price differences were justified under the Act. Congress, asserts the respondent in a question-begging conclusion, had no intention to give to untutored state courts power to decide such questions.

The second part of respondent's argument is based on the unargued premise that the incomplete pre-trial conference was actually a trial of the issues of illegality adequate to protect petitioner's federal right. The only reason given in respondent's brief for such an interpretation of the pre-trial is their assertion that such procedure was in accord with settled Florida practice.

The incorrectness of this assertion is made evident from a brief examination of the Florida rules themselves. They are designed, as is usually the case with pre-trial conference rules, to simplify the issues. And at the pre-trial conference before us one issue at least was made clear and simple. The burden of proof was admitted to rest on the respondent to justify the price differences shown by the record. Respondent expressly stipulated that this issue was before the court. That issue has never been tried according to Florida procedure. However, whether this summary judgment is in accord with Florida rules is immaterial where a federal right is involved.

It can hardly be argued that a hearing at which petitioner was deprived of the right to cross-examine witnesses and to produce as relevant evidence respondent's accounts with petitioner's competitors to sustain its pleas is a trial of the issues raised by its pleas adequate to protect its Federal right. Nor can it be argued that respondent met its admitted burden of proof to justify its admitted price differences when it refused to submit its relevant accounts in evidence. Respondent does not attempt to so argue. Instead its brief obscures the character of the trial by state-

ments intended to give the misleading impression that petitioner in the trial below had every opportunity to complete its testimony and refused to do so.

As Mr. Justice Stone recently said in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 176, 63 Sup. Ct. 172, 173-174:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad *v.* Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law . . . When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . ."

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